IN SUPREME COURT—No. 195.

JOHN B. CRIM, Appellant,

vs.

JAMES M. HANDLEY, Appellee.

Appeal from 5th C. C. U. S. Southern District of Ga.

STATEMENT OF FACTS AND BRIEF OF AUTHORITIES.

R. F. LYON, for Appellant.

Jas. P. Harrison & Co., Publishers & State Printers, Atlanta, Ga.

IN SUPREME COURT—No. 195.

JOHN B. CRIM, Appellant,

vs.

JAMES M. HANDLEY, Appellee.

Appeal from 5th C. C. U. S. Southern District of Ga.

Statement of Facts and Brief of Authorities.

R. F. LYON, for Appellant.

Jas. P. Harrison & Co., Publishers & State Printers, Atlanta, Ga.

IN SUPREME COURT—No. 195.

JOHN B. CRIM, Appellant,

vs.

JAMES M. HANDLEY, Appellee.

Appeal from 5th C. C. U. S. Southern District of Ga.

Statement of Facts and Brief of Authorities.

R. F. LYON, for Appellant.

Jas. P. Harrison & Co., Publishers & State Printers, Atlanta, Ga.

JOHN B. CRIM, Appellant,

vs.

JAMES M. HANDLY, et. al., Appellees.

On Appeal from 5 *C. C. of U. S. for So. Dis. of Georgia.*

This bill was filed for a new trial, and to stay the collection of a common law judgment, rendered in favor of appellee, against King, Crim & Co., of which firm appellant was a member, in the Fifth Circuit Court of the United States for the Southern District of Georgia, on the 15th of May, 1873.

The court refused the injunction, and dismissed the bill. On which decree this appeal was taken.

An examination of the Record shows that on first day of February, 1866, the firm of King, Crim & Co., a mercantile firm, composed of Benjamin F. King, John B. Crim, the appellant, William N. Peeples and one John G. Tramel, this firm was formed for the purchase of the stock of goods then owned by J. W. Buffington & Co., who were engaged in merchandising in Dawson, in the County of Terrill, and State of Georgia, up to that time.

William M. Peeples was one of the old firm of Buffington & Co., and the only member that entered into the new firm. The remaining members of the old firm, after the sale of its entire stock to this new firm, left the country, without the payment of its debts.

In settling for the purchase price of the goods, King, Crim & Co., fell short $4,591.64 for which they executed their four notes payable to J. W. Buffington & Co., or bearer, each for the sum of $1,147.91 and payable on the first days of April, May, June and July respectively, and as it was understood that a number of the debts of Buffington & Co., were unpaid for which Peeples would be liable, (for his protection and security against these debts) these firm notes of King, Crim & Co., were placed in the hands of Harrison Rodgers, of Dawson, who was to hold the notes, and as the debts of Buffington & Co., came in and were paid by Peeples or King, Crim & Co., the amounts so paid were to be credited on these notes.

On this understanding King, Crim & Co. took up a debt of J. W. Buffington & Co., to Samuel Roosvelt, Agent, of New York, of $1,045.05. They also controlled some other small debts of Buffington & Co.—one to Edwards of $232, and one to King of $432—and

these were offered to Rogers as payment on the notes. Rogers refused to accept them—or either—but placed the note first due in the hands of F. M. Harper, an attorney at law, for suit, and who brought suit on it to the May term of Terrell county Superior Court, 1866.

Thereupon King, Crim & Co. filed their bill in equity in Terrell Superior Court, returnable to the May term, 1866, against Buffington & Co., and Harrison Rogers, their agent, to enjoin that common law suit, enforce the agreement between complainants and Buffington & Co., and to have their said notes so paid and controlled by them applied to the debts of Buffington & Co., etc.

At the November term, 1866, of that court, the bill was amended, in which it is stated, among other things, as follows: "And now, since the filing of the same," that is, the original bill, "other indebtedness has come against the firm of Buffington & Co., and is under the control of your orator, Wm. M. Peeples, who is mainly looked to for the payment of the same, the parties relying on him as the leading member of the firm, in consideration whereof he," that is, Peeples, who verifies the amended bill, "is advised that it is material for them to so amend said original bill as to include said indebtedness, although some of the claims so under his control have been proceeded in by attachment suits at law against the non-resident members of the firm."

The schedule of these debts, which is attached to that amended bill, is ~~not~~ in the record, but their identity and connection with this cause will be very clearly established from the record as the history of this cause is unfolded.

Among the goods sold by Buffington & Co. to King, Crim & Co., were a lot of 988¾ bushels of cotton seed, at one dollar per bushel, and which they sold to planters for planting purposes, and the seed proving bad, the planters refused to pay for them, and King, Crim & Co. claimed that they were entitled to a credit on their notes for this sum, as well as what they had paid on the debts of Buffington & Co.

After filing the original bill, or about the same time, attachments were sued out against Buffington & Co., in favor of Longstreet, Sedgewick & Co., Pardee, Bates & Co., and Tracy, Irwin & Co., all of which were levied by serving summons of garnishment on King, Crim & Co.

Longstreet, Sedgwick & Co. debt being about . .	$1,313 56
Record, page 3 and page 51, ...	135 38
	$1,448 94
Pardee, Bates & Co., due 1st May, 1866, . . .	2,048 54
Tracy, Irwin & Co., (Record 57), ...	1,107 79

These were the notes sent to Peeples and controlled by him, as stated in their amended bill. One of them, that of Pardee, Bates & Co., was sent directly to Peeples with authority to him to collect it. The other two were sent to C. B. Wooten, at the suggestion and direction of Peeples. See correspondence, Record, pages 77 and 78.

This correspondence was had and authority given in April, 1866, except that of Pardee, Bates & Co., whose claim was not sent out until 11th June, 1866. James W. Handley was at that time the agent at least of Longstreet, Sedgwick & Co.

This being the condition of these parties and their claims.

The original and amended bill was filed by Wooten & Hoyl as solicitors, nominally at the instance of King, Crim & Co., but in fact in furtherance of the interest of Peeples and Longstreet, Sedgwick & Co., and Tracy, Irwin & Co. The attachments were also filed by Wooten & Hoyl, at the suggestion and direction of Peeples to collect these claims for a compensation to be paid him, Peeples, as the agent of the creditors, he being at the time one of the debtors, and the only one accessible to suit. C. B. Wooten, being the senior and leading member of the firm, is the solicitor of the complainants in the equity cause and the attorney of the plaintiffs in the attachment suits at law. (Record, page 64.) At the May term, 1866, of Terrell Superior Court, to which the equity cause and the attachments were returnable, King, Crim & Co. appeared as required by statute, and filed their answer to this garnishment, admitting their indebtedness on the four notes of $114.91 each — ~~uqeal~~ equal in all to $4,591.64 — from which they claimed should be deducted as payments—

Amonnt paid S. Roosvelt, ...	$1,053 31
Amount paid B. F. King note on J. W. B., . .	432 00
Amount paid J. W. Edwards for J. W. Buffington & Co.,	232 00
Cotton seed warranted good, but worthless, . . .	988 75
	$2,704 56
Leaving a balance of	1,885 08

which they by their answer admitted to be due. This answer was accepted by the creditors, and no traverse filed.

At the November Term, 1866, a consent verdict was signed in the equity cause, controlled as stated above, in which it was declared that the sets-off prayed for in said bill be allowed; that Rogers, the agent, be allowed to proceed with the collection of the note, with the proviso that he receive the part as entire payment of the same, the sets-off prayed in said bill, together with any indebtedness the complainants may have paid off for their confederates (Buffington & Co.,) as charged, and with the further proviso, that he

take and receive in payment of the notes, any other notes and accounts offered and set up in said bill and amendment exhibits, and should any money come into his hands, he should report the same to the next term of that Court, and pay the same into Court. And so it was decreed, which decree was signed by Wooten & Hoyl·

On the 30th May, 1866, John B. Crim, the complainant in this bill, sold out his entire interest in the goods and business of King, Crim & Co., to Wm. M. Peeples and E. B. Loyless, who formed a new firm under the name of E. B. Loyless & Co. The other partners—Trammell & King—had parted with their interest in the firm before this time. In this sale, E. B. Loyless & Co. agreed with this appellant to pay all the debts of King, Crim & Co., and Loyless executed to Crim a mortgage on a large amount of real estate in Dawson, to secure that agreement, (*see record*, 79,) so that, in November, 1866, when the amended bill was filed, and other proceedings were taken, Crim, the appellant, having parted with his interest, and being fully indemnified, took no interest in the proceedings.

The new firm of E. B. Loyless & Co. was garnisheed, as well as the old firm, and it seems that they, too, had answered similarly to the answer of King, Crim & Co., for at the November Term, 1867, attaching creditors took judgment against them, E. B. Loyless & Co., not King, Crim & Co., for the amount admitted by King, Crim & Co. to be due to-wit, $1,885.08, (*record page* 29,) although a payment had been made in the meantime, on the note first due, of $221.68.

And then on the 4th of December, 1869, C. B. Wooten, as the attorney of these parties, gave to James M. Handly, the appellee, an order on Peeples for $784, (*see record page* 36,) which he said, in the order, was what he found due to Longstreet, Sedgewick & Co., on calculation. It is admitted that this was paid.

Peeples also paid to the Sheriff on the fi. fa. against E. B. Loyless & Co., in favor of Longstreet, Sedgwick & Co., on their answer to garnishment in the attachment cases $18,200, which was received as a credit.

Thus it will be seen that on 29th of May, 1866, the balance on the King, Crim & Co., notes was, and so agreed on by the creditors, and all other parties, and which was to be paid, viz:

The sum of : : : : : : : : :		$1,885 08
(*See Wooten's answer, Record*, 64.)		
On this had been paid and credited on the note		
24th January, 1867, : : : : : :	$221 68	
To Handley in December 1869, (*Record, page* 29)	784 00	
To sheriff (*Record, page* 65) : : :	200 00	—$1268 68
Leaving only a balance of : : : : : :		$619 32

To which must be added some interest, and Wooten claimed that there was a balance due of about $800.

Peeples denied this. He said he had paid Mr. Wooten three hundred dollars and Harper two hundred and twenty-five dollars, which should be credited, and that he was entitled to compensation from these creditors for his valuable services in trying to collect their debts for J. W. Buffington & Co.

This was the whole dispute, and on which Peeples, Wooten and Handley could not agree.

Up to this point, however, everything had worked along most harmoniously and smoothly, Wooten representing King, Crim & Co., E. B. Loyless & Co., and the creditors of J. W. Buffington & Co., F. M. Harper representing J. W. Buffington & Co. and their agent, Rogers.

When the controversy came, it lay between and with Wooten and Handley, representing the creditors of Buffington & Co., and E. B. Loyless & Co. Crim, the appellant, did not feel interested in the controversy. He was indemnified beyond all risk, to a large amount, although he was, in fact, liable for whatever that difference might be, when it was ascertained. It was only necessary for him to take an active interest, when the others who stood before and were liable to him had failed to pay. He was so treated by Wooten and the creditors, and judgment was not even taken, or attempted to be taken, against him on his answer to garnishment. On the contrary, it was entered up against E. B. Loyless & Co. He could not voluntarily settle that difference. It was unascertained, unsettled, and disputed by those who stood before him, and to have settled such disputed claim without their concurrence, and in opposition to their claims, would have been to unnecessarily put in jeopardy his right to make his security available. So he could only stand by and let the others settle the controversy between themselves, as to the amonnt due.

In the meantime, however, Rogers, the agent had turned over the notes to Col. Wooten, in compliance with the decree to settle according to the decree or arrangement which had been agreed on by all the parties, and Handley, the appellee, had from being a clerk, runner or drummer for the creditors of Buffington & Co., bought the claims of Pardee, Bates & Co., and Tracy, Irwin & Co., and was a holder thereof, at some price so insignificant that he does not avail himself of the opportunity afforded him of disclosing it; but he was so with the full knowledge of the condition of the papers, the claims of all the parties, and the rights of Crim and E. B. Loyless & Co. For if he did not actually know all the facts himself, his agent, attorney and trustee for whom he got these notes, did. Besides, the notes were also part due, and there is no pre-

tense that he, Handley, was a *bona fide* purchaser without notice, etc.

The purchase of the debts on J. W. Buffington & Co. by Handley gave him no legal right or title to hold the notes on King, Crim & Co.—they were not his nor their's—nor did he thereby acquire a title to them. The title to them was in Harrison Rogers, in trust to collect the balance due on them, if any, and to account to the Superior Court for the same, so that it might be distributed by that court towhomsoever was or might be legally entitled to the same, and the notes were actually put in Wooten's hands by Rogers to carry out that decree, and his suing the whole of these notes in the Circuit Court of the United States for the Fifth Circuit in the name of Handley, was a violation of the terms on which he took them—it was in violation of good faith on his part to his clients, King, Crim & Co., and the relation he occupied to them in the decree taken, the adjustment and mutual settlements in respect to these papers.

These remarks are made, not as equities in appellant's behalf—for, perhaps, he lost his right to make them available as a defense to Handley's suit, by not pressing them before judgment—but to show that Handley's case, on his part, is without merit; that he does not occupy such a place in the record and judgment impeached as entitle him to any especial consideration as a favored litigant, and to show that while he obtained an unconscientious advantage as against complainant, he is absolutely without an equity or merit on his own account.

The suit being brought, the parties prepared for defense, and the complainant, Crim, on his part, employed counsel to represent his interest in that suit, directing them to look to and confer with Peeples, by whom all the facts could be proven. Under Crim's relation to the case and the other parties, he could do no more than this. This position was well understood by the other side, and he was so treated and respected. Wooten, in his efforts to effect an amicable settlement, before and after suit, made all his propositions, and had all his consultations and negotiations with Peeples and Loyless, not with Crim.

Peeples, therefore, was a most important man. He had transacted all the business, made all the payments, kept the accounts, and he and his partner, Loyless, were to make the payments, if any were to be made, besides, he was a disinterested witness. He was in bankruptcy, and whether Crim was discharged from the payment of the debt or not, did not and could not affect Peeples' liability; for as one of the firm of J. W. Buffington & Co., he was liable for these debts in any event. No one did, or could, know the facts better than he, and Crim and his counsel had a right to

rely on him, not only for the foregoing reasons, but for the additional one, that in prosecution of the claims against the assets of J. W. Buffington & Co. by their creditors, Peeples was their agent, who actually controlled and directed this litigation, employed counsel for them, etc.

Peeples, in preparing this defense, overreached himself in putting forward as payments on the notes, receipts for money payments on the goods, independently of the notes.

Counsel could not know that these were not proper credits on the notes. The notes were dated the 1st of February, and the receipts were given after that date. He succeeded in convincing Crim that they were proper crdits, and he, Crim, honestly testified that they were so. It was easy to make him believe this, as he had, while a partner five years previously, left all the business in the hands of Peeples, and had been for five years disconnected therewith, with a feeling that he was not interested; and when the receipts were shown him as payments after the lapse of so long a time, it was easy to convince him that they were payments.

It is to be regretted that the complainant was drawn into this mistake, but his candid acknowledgment of his error and plain statement of how it was brought about in his bill, is an ample atonement for the blunder. Peeples ought to have known better. He kept the books, had them before him, or ought to, and had had so much and so recent a controversy of what was due and what was not, and by imposing this evidence on the counsel, who could not know better, and who, by putting the defense on this line, exposed himself to a disaster that was irreparable.

And then while on the stand as a witness, he wholly failed to prove the payment of the debts of J. W. Buffington & Co to S. Roosvelt, how the payments were made, to whom or how much, and the complainant lost the benefit of this credit of $1,055.04 and order in favor of Handley on Peeples of seven hundred and eighty-four dollars and other credits. (See Record 45 and 47 and 71.) It is immaterial how he failed—whether from a failure of memory, sickness, or want of knowledge. We had relied on him to make the proof, and he had not done so. So of the payment of the notes to Edwards, to King, and to Handley — the whole of them were excluded by the jury in making up their verdict. His condition and his manner of testifying, and the nature of his evidence as given, acted as a complete surprise, from which we could not extricate ourselves, nor could we ask for a continuance on this account, for the reason that counsel at the time and in the absence of the complainant did not know how he could remedy this evil. He and his client had relied on this witness, and he having failed, we could not supply the loss, nor know how

it could be remedied in the future. Hence, the case had to go on under the circumstances, resulting in our complete overthrow, and it is to be attributed to the misconduct of this witness.

2. The loss of the Records and pleading in the proceedings in Terrell Superior Court, hereinbefore referred to and set out in the Record, was another and great cause of discomfiture. It being able to prove that a verdict and decree had been rendered in the cause, we were not permitted to go into the contents of that proceeding, or what had been done under them. Although the loss of the papers had been fully established, upon the principle that unless a decree had been had in the cause, the proceedings did not and could not bind anybody. The decree in that cause was of the very greatest importance to the defence of the common lawsuit, with that decree and the facts it established, there could have been no recovery for the plaintiff in common lawsuit, or if any at all nothing beyond the amount claimed by Wooten to be due.

Crine, the complainant, was entitled in this trial to the benefit of whatever those proceedings would show. It was a proceeding to which the creditors and claims represented by Handley against J. W. Buffington & Co., were in fact parties got up by their counsel and agent for their benefit, and a decree rendered, to which they had consented and by which they were bound. The papers were out of the office, could not be found up to the trial, although Crim and his counsel made the most diligent search for them. Mr. Crim was in no wise responsible for their loss; it is not pretended that he was, or that he could or might have done more to procure them.

Were they material? Most clearly; for they showed that Handley had no legal right to control these papers; that they were charged with the payment of the debts of Roosvelt, King, Edwards, and that Peeples and Wooten, acting together, in fact controlled the whole of these debts now claimed and controlled by Handley. Had this testimony been before the Court, the defense that the debts were discharged down from $600 to $800, would not have been controverted.

These papers having been lost, and out of their place, up to, during, and until after the trial, and when they could not by any manner of means be made available as a defense at common law, the complainant was forced to go into a Court of Equity, where he can be allowed a new trial, in order to get the benefit of this evidence, which he could not have at common law, by reason of its loss. And they were lost up to the time of the motion for a new trial, and not discovered until too late to be made available in that motion.

Now, if it be said that Crim, being a party to that proceeding,

and was presumed to have known of its existence, and ought to have taken steps to have had the testimony at Court, and on the trial, the reply is, that while he was in fact a party, he was only nominally so. Peeples, Buffington & Co., and their creditors, were the real parties. Crim had no more interest in the proceedings than a mere stakeholder.

Again, if it were otherwise, here was Mr. Harper, who was one of the counsel that got up the decree, etc., and Peeples, and they did not prove these facts. It is enough to say that he, Crim, had the right, even if he knew that the decree was taken and formally rendered, and what its contents were, to depend upon the contents being proven by Harper and Peeples, even if he had been put on notice that the facts to be established by the decree were, or would be put in issue by that proceeding—and this he had no right to expect, but, on the contrary, that the facts would be admitted, as I shall hereafter endeavor to show.

If it be asked on what principle the new trial is asked on this ground, I reply, upon the same principle or a like one that allows a a new trial in cases of newly discovered evidence.

It was known that such evidence had existed, but the trial was had, and the case proceeded as if no such papers had ever existed, and as if they had been blotted out of existence forever.

And if not on that principle, then, upon the general one, to-wit, that in that trial an unconscientious advantage was obtained against this appellant for the want of that evidence, for the absence of which he was at no fault. Now that it has come to light, after it was too late to be available on that trial, a Court of Equity will not allow such inequitable advantage to be retained, when this evidence, coupled with that already in, and that which complainant had provided to have there, and which was not in evidence and fully proven, by reason of the witness Peeples' failure to establish, by his evidence, what he really knew and what complainant knew he could prove, and relied on him to prove, would necessarily, on another trial, produce a different result.

Then again, the attorney of Handley, the nominal plaintiff in this trial at law, Col. C. B. Wooten occupied that confidential relation to this complainant, that gave him the right to rely on his good faith to himself; and the peculiar and important duty and trust he had in the collection of these notes, to see to it that all proper credits should be allowed, so that only such amount should be collected out of complainant, or any other of the parties to this paper, as was really due.

That was the duty charged by the consent decree in Terrell Superior Court upon Harrison Rogers, the agent of J. W. Buffington & Co., a decree taken by Col. C. B. Wooten, agreed to by Buffing-

ton & Co., and the creditors of Buffington & Co., so the whole litigation in respect to these notes had been settled, and this decree was in exact accordance with the understanding and agreement under which the notes were made and placed in the hands of Harrison Rogers; and when Rogers turned over these notes to Col. C. B. Wooten, in accordance with that decree, Wooten was charged with that trust, and all the obligations and liabilities imposed by that decree, and he was as much bound in law, equity and morals to carry them out, and in furtherance and protection of the rights of this appellant as of the creditors of J. W. Buffington and Co.; and Crime, this appellant, from his stand-point and relation, had the right to fold his hands and rely on Wooten's good faith in carrying out that decree, in letter and spirit. (See Wooten's receipt to Rogers for these notes, (Record, page 28.) That he employed counsel in that litigation does not change the principle, or relieve Wooten from the obligation or duties imposed in that decree, and the terms on which he became connected with their interests, independent of his obligations as a solicitor in equity, an attorney at law, officer of the Court, to at least take no improper advantages of those who confided in him, nor practice any fraudulent act or trick that would, or might, work an injury to parties litigant in the Court, in matters to which he was in anywise a party.

Now, what were Mr. Wooten's duties and obligations in this matter, in which Crim, appellant, had rights? What did he do, or fail to do that he ought to have done, that was wrongful and to the injury of the appellant? And of what trick or practice was he guilty to the hurt of Crim, and which were inconsistent with his professional duty as an attorney or solicitor in this litigation?

Mr. Wooten was, in this case, the real plaintiff—he, and he alone, had the right, and it was his duty to control the case and the litigation absolutely, so as to allow nothing to be collected on these notes beyond the amount that he claimed to be really due and owing to J. W. Buffington & Co. or their creditors. The institution of this suit in the name of Handley as plaintiff and by Hines & Hobbs as the plaintiff's attorneys, was a pretext and a contrivance. Wooten, notwithstanding, had the right to control the case, and did continue to occupy that place in the case from its beginning to its end. (See Record 61–62, as to Wooten's admissions of his being the counsel, his control of the notes, his offer of settlement, and which he did not do only because Peeples and complainant would not settle what he claimed to be the balance, and see also Record, 53, where Handley does not deny but that Wooten was the counsel in the case, with the right to control it, etc., but he merely says that "from that time" the com-

mencement of this suit, Wooten never appeared in the said case as his counsel. And, again, on page 54, "It is not true that C. B. Wooten was leading counsel in said case, in fact, said complainant through his counsel knew that Wooten had never appeared in said case."

It was the duty of Mr. Wooten to have so credited these notes as to have shown that the balance due on them 29th of May, 1866 was only $1,885.08, that was the amount agreed to by all the parties on 29th of Nov. 1866, to be the balance due, (see Record, page 64.) "It was at the instance of Peeples that the bill was filed for King, Crim & Co. The creditors did sue out attachments, and if defendant remembers correctly, garnisheed King, Crim & Co., and E. B. Loyless & Co. They both made the same answer, by an arrangement between them, as defendant understood the latter firm had assumed the payment of said notes, the notes sued. By this answer it appeared that after allowing all proper credits and sets-off claimed by them there was due on said notes some $1,834, (it should be $1,885,) as well as defendant remembers, instead of of $1,885 as stated in complainant's bill. Judgement was taken for that amount in favor of said collecting creditor against said E. B. Loyless & Co. Why not against said King, Crim & Co., defendant can not now state. Defendant then representing King, Crim & Co., to the amount of their proper claims and sets-off against said notes, and their said creditors for the balance due thereof." In other words he represented all of them together, "recognized and treated said sum as the amount *then due on said notes* after making all deductions claimed by said King, Crim & Co." It is true that Mr. Wooten adds that " in this he acted upon their representations and accepted their statements under oath as true."

Does he mean to intimate that the statements were untrue, and that *he* had the right to go behind that adjustment and show a different amount due? If he does, and it really appears that such was his idea, he clearly could not do so, for that adjustment was binding on him and Handley who held under him, bsides he only had the right to control the notes under the decree, which was binding on him and the creditors, to collect that balance.

Then, after this, and while he and Rogers so held the notes, there was collected by some one of them and credited on one of these notes 24th January, 1867, of $221.68. This credit is stated in various places in the Record as being $271.68. This is erroneous.

The correct sum is : : : : : : :	$221 68
And to Mr. Harper for fees on these notes, : : : :	225 00
To the sheriff on the execution against E. B. Loyless & Co., the balance which he admitted to be due of : :	200 00
And the order given and paid to Handley of : :	784 00
Making the sum of : : : : : : :	$1,430 68

Which he should have deducted from the $1,885 and interest, leaving only the balance to go to the creditors. It is true that he does not admit both the credits of $221.68, and the one to Harper of $225. He says he thinks that only one of these credits should be alowed, but Harper says differently, and so positive is he about it, that his recollection is better than Wooten's. Admit that this was a matter on which the jury were to pass, and I think I will show that the jury allowed both of these as proper credits in their finding. Still, he admits all the balance were proper credits, and his admissions are conclusive on this plaintiff; and these being true and proper credits, it was his duty, by reason of his relation to the complainant, and the terms and obligations on which the papers were received by Rogers, to have allowed these credits as payments on the note, and only to have gone for the remainder after deducting these credits, and as he did not do either before the trial, or now, when there is a plain attempt on the part of Handly to enforce this judgment for a sum far in excess of the amount due, as he admits, it was and is such misconduct, such a breach of the terms and conditions on which he was allowed to take them, that it becomes the duty of a Court of Equity to compel the correction of what has been done by this wrongful act.

Again, when this suit was commenced, it being well understood that Wooten controlled it, and that it should not be wrongfully used, it was agreed between Mr. Harper, now (that is in the defense of the common law suit) representing King, Crim & Co., and E. P. Loyless & Co., and Mr. Wooten, that no trial of the case should be had unless both of them were present.

Mr. Harper establishes this agreement, and Wooten admits it (record page 66), and when the case was assigned for trial, and Mr. Harper came, as he had agreed, expecting to find Wooten in attendance on the court. Having failed to find him in Macon, where Wooten resided, after a diligent search, or at court, and failing to reach him by telegraph or otherwise, he appealed to Mr. Hines, the associate counsel, to continue the case on account of Wooten's absence, in violation of this agreement, etc. This application was refused on the pretense that the plaintiff did not want him and had nothing to do with him (record 74 and 75), and, as this agreement could not be enforced at common law, complainant's only plan or chance for relief against this misconduct and breach of faith on the part of Wooten to complainant, is in this proceeding.

Mr. Wooten claims to have been sick. If he was so, then this was such a Providential hindrance as would justify the Court in not holding the complainant liable for its consequences; but it was his duty, at least—occupying the position to the case and

parties that he did—to have required Handly or Mr. Hines to postpone the case. It was in his power to do so, and he did not, nor did he make any effort to do so. The facts of the case, as stated by himself and Mr. Harper, coupled with the manner of this suit—the neglect to give the credits at the proper time—the whole management, and the effort to take advantage now of the wrongful result of these mishaps, appear as they were a part of a common design to practice and obtain unfair and unjust advantages of this complainant, and when obtained to enforce them at all hazards, however unjust, and it is confessedly so.

Another gross fraud in law has resulted to this complainant from these wrongful and improper practices, in this: He, the complainant, was fully indemnified for the whole amount due on the face of these notes by the mortgage on the real estate in Dawson from Loyless, who had purchased his interest in the business of King, Crim & Co, and when Wooten and Peeples had reached a point in their adjustment and settlement of these notes at which the balance claimed by Wooten as the representatives of the creditors was only between $700 and $800, as he told Crim repeatedly. Crim, on the faith of these admissions and to relieve the increasing embarrassments and necessities of Loyless, surrendered his security to such an extent that he only reserved a sufficiency to pay this admitted and claimed balance.

Now, after having acted on these admissions of Wooten, when he had a right to make them, and when they were binding on whomsoever should afterwards take these notes. Whatever may be the result of this litigation, or the right of Wooten and Handley under it as against Peeples and Loyless, it is contrary to good conscience and equity to allow him to go behind such admission to the prejudice of Crim. On the contrary, he must stand by them, and if he or those claiming under him do not, a Court of Equity will compel them—otherwise, these parties will be permitted to reap and enjoy the fruits of a most iniquitous fraud.

This bill does not seek to review or condemn the action of the court, either in allowing this judgment at law, or in refusing a new trial, but to ask relief in a court of equity from the effects of the judgment rightfully rendered on the facts before it, or if not rightfully rendered, one in which the complainant has had his day in court, on grounds, equities and proof not before that court, not considered by it, and for the absence of all which at said trial the complainant was in no wise responsible, and if at fault at all it is a fault under circumstances for which a court of equity will excuse him.

In the efforts of the defendant to repel the equities of complainant it is claimed that the object of that suit was to settle doubtful

and disputed rights, matters that was claimed by the plaintiff to be one way, and by the defendants in that suit another way, and that a fair trial having been had and a conclusion reached, the complainant is bound by it.

This does not state the case fairly and is not true at all.

It is true that the suit was to settle a disputed amount, but it did not go to the whole amount stated on the face of these notes, to-wit: the sum of $4,591.64, with interest thereon from the maturity of the notes, but the real dispute was whether $700 or $850 with interest from latter part 1869 was due or nothing, that was the dispute; and when the plaintiffs in that suit went for the whole sum, admitting nothing to have been paid, complainant was justly surprised by such a course.

Another reply is a very severe assault on the conduct, worthlessness and unreliability of Peeples. All this may be perfectly just, and deserved by Peeples; but that is nothing to us; the complainant is not to be affected by that. On the contrary, it is of this that we complain, and on which our equities largely rest. Peeples was one of J. W. Buffington & Co.; one of the original debtors of their creditors, against whom are the claims represented by Handly. He was the agent of these creditors, as well as their debtor; he controlled that litigation; he was, on these accounts, most familiar with all the facts; the most important, and perhaps the only witness on many points, that we could get. Otherwise he was nothing to us, but a debtor, as he was of the creditors of Buffington & Co.; but as a witness he was, or ought to eave been invaluable. As such we depended on him, as we had a perfect right, under the law, to do. And he had failed us at a time when we could not cure his failure by any act of ours, and we have a clear right to be relieved against the consequences of such failure; and that is a large part of the equity of our case—the misconduct and worthlessness of Mr. Peeples.

Another reply is, that if we had a new trial we would be no better off—it could not help us—that Peeples' corrupt perjury and misconduct in this and other cases has ruined him as a witness. Concede that we do not wish to use or again to rely on him as a witness, we have now the admission of Handly and Wooten both, the decree and proceedings in Terrell Superior Court, which make the defense of Crim, down to a certain disputed point, beyond controversy. As the case now stands confessed, the only object of the suit at law was to compel the defendants thereto to pay a balance which was disputed by Peeples, of perhaps $850, about and in which Crim, from his position, was obliged to be neutral, as already stated.

Another argument greatly pressed by Handley and Wooten—by the latter very unjustly—is that, inasmuch as Peeples, on the 4th December,

1869, accepted and paid an order in favor of Longstreet, Sedgwick & Co. of $784, it was a clear admission that there was due pro rata payments to Tracy, Irwin & Co., and to Pardee, Bates & Co., and that as the claim of Tracy, Irwin & Co. was $1,107.78, and Pardee, Bates & Co. $2,048.54, while Longstreet, S. & Co. was only $1,448.94, the balance to be paid to equalize them with L., S. & Co. would be much larger. Now, Mr. Wooten ought to have known better than this, because the admitted balance being, in the fall of 1866, only $1,885—after deducting the items of $221.68, $225, $200 and $784 already stated—such very large balance could not be left. Besides it was well known to him that Pardu, Bates & Co. did not stand equal with Longstreet, Sedwick & Co. in the distribution of this money, for L. S. & Co. had attached and had lien as attaching creditors, from April 1866, and so perhaps of Tracy, Irwin & Co., while Pardee, Bates & Co., if they attached at all, could not have done so until after 11th June, 1866, when their debt was sent from New York to Peeples for collection. (*See Record* 78.) Therefore, the whole debt of Longstreet, Sedgwick & Co., and of Tracy, Irwin & Co., perhaps if it attached, were to be fully paid before Pardee, Bates & Co.'s claim could receive anything under the law, and this will account why it was that L., S. & Co. received so large a sum under the circumstances, and it will also corroborate the statement of Wooten, that the unpaid remainder was only from $700 to $850.

The complainant's theory of the finding of the jury is this:

Interest was clearly repudiated by them, and they considered the whole amount of the notes due, of....		$4.591 64
They allowed a credit for the cotton seed—988½ bushels at $1.....	$988 75	
The credit on note of.....	221 68	
Payment to Harper of (see record 35).....	225 00	—$1,435 43
		$3,156 21
The verdict was for.....		3,154 21
Being only a difference of.....		...$2 00

or the difference between 4 and 6, which difference may be properly attributable to an error in deducting or adding credits—in mistaking a 4 or 6, which is easily done, and in no other reasonable way can it be accounted for. It takes these exact figures in dollars and cents on both sides to make the sums otherwise found, and to corroborate this hypothesis; and this being true, they wrongfully and unjustly failed in their finding

to allow complainant a credit for the Roosvelt claim of.....	$1,053 31
The B. F. King note of.....	432 00
The J. W. Edwards payment of.....	232 50
The cash to Sheriff by Peeples, which Wooten admits he received, of.....	200 00
The payment to Handly of.....	784 00
Or.....	$2,701 81

of actual payments made in 1866 and 1869, which were disallowed by the jury and lost to the complainant by reason of the conduct of the witness Peeples, his failure to prove them by his evidence before the jury as he had promised complainant he would do.

And by the misconduct of A. B. Wooten in not crediting the notes with these amounts, as he had promised to do, as it was his duty, and as all parties in interest in the notes had agreed should be done under the direction or decree of the court, and on the faith alone of which the notes had been put into his hands, and the displacement and loss of the court papers as before stated, and it is for relief against these iniquities and wrong that this bill is filed.

In coming to the foregoing conclusion, there is much of the record to which no especial attention has been given, because it is encumbered with much that is useless.

Very little attention has been paid to the affidavit of Mr. Handly, because it is not estimated to be of any value by reason of its presumption, argumentation and flippancy. I have attempted to press into this service only such facts of the record as are pertinent and commanding, and on these facts and reasons the appellant submits the following points and authorities:

JOHN B CRIM,
vs.
JAMES M. HANDLEY and others.

The general rule on which new trials are granted by courts of equity and injunction allowed against judgments at law may be stated thus:

Any fact which clearly proves it against conscience to execute such judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by mistake or surprise produced either by the plaintiff's witnesses, or the act of the other party, or by the fraud or misconduct of the other party, and unmixed with any neglect or want of care on his own part. Story's Eq. 878-8, Marine Ins. Co. vs. Hodgson, 7 Cran 335, Pearce vs. Chastain 3, Kelly 573-4, Booth vs. Stamper, 6 Ga. 175, Gainesborough vs. Clifford 2 P., Wm. 424, Humphries vs. Humphries 3 P., Wm. 395, Veazie vs. Williams 3 Story Rep. 611, Fisk vs. Hunt 2 Story Rep. 587.

To this may be added a confidence or trust in the other party, which has been abused either innocently or by design. Webb vs. Parker 41 Ga. 478.

A mistake of the witness has been always held sufficient. Tarver vs. McKay 15 Ga. 550, Richardson vs. Fisher 1st Bing. 145.

Surprise, to be a good ground of new trial, must be clearly shown; must be a material point, that ordinary care and prudence could not have anticipated or prevailed against—that the contrary can be proven; that there was no opportunity of meeting it on the trial, or in the court of

law, by motion for new trial, and that it is not cumulative; that no negligence is attributable to the surprised party, and that it prevented the case from being heard on its merits. Graham on new trials 168-9.

Blake vs. How 1 Ark. 306, Smith vs. Morrison 3 A. K. Marshall 81, Guthrie vs. Bogart 1 A. K. Marshall 334, Blythe vs. Sullivan 3, McCord 258, Gibenitz vs. Greenleaf 2 McCord 313, Comply vs. Brown Const. Rep. 100, McFarland vs. Clark 9 Dana 134, Holly vs. Christopher 3 Mon. 14, Thompson vs. Williams 7, S. & M. 270, Prettyman vs. Waples 4 Harrington 299, Carr vs. Gale 1 Curtis C. C. Rep. 384, Roberts vs. Holmes 25 Eng. L. & Eq. 420, Dow vs. Watson 28 Miss. (6 Cush.) 383, Ellis vs. Kelly 33 Miss. (4 George) 695, Peck vs. Helir 30 Barb. 655-6, O'Conner vs. Duff 30 Miss. (9 Jones) 595, Patterson vs. Eley 19 Cal. 28, Howell vs. Howell 37 Mo. 124, Cook vs. DeLaguena 24 Cal. 237, Holbrook vs. Nichol 36 Ill. 161, Hervey vs. Nourse 54 Maine 256, Brook vs. Douglas 32 Cal. 208, Chicago & C. R. R. Co. 45 Ill 311, Haver vs. Lane 45 Miss. 608, Merrick vs. Bruten 26 Ark 496, Butler vs. Capaut 40 Cal. 74.

Surprise is that situation in which a party is unexpectedly placed without any default of his own, and which will be injurious to his interest. Graham on new trials 875. And while surprises do not generally merit relief, and while courts give relief on this ground with reluctance, *id* 876, yet they universally do so, in a proper case as foregoing authorities will show.

Where a witness, by his knowledge of the facts, and by his statements to the party calling him, induces the honest belief that he will swear to certain facts which are known to be within his knowledge, and other evidence to prove the same facts is not procured at the trial by one relying on these statements, and the witness fails to prove these facts, either from mistake or inadvertence, confusion, indisposition, or any other cause, when no fault or blame is imputable to the party relying on his evidence, a new trial will be granted. Theobold vs. Hare 8 B. Monroe 39, Wilson vs. Brandon 8 Ga. 135, Nelson vs. Walters 18 Ark. 570, Rodrigney vs. Comstock 24 Cal. 85, Todd vs. The State 25 Ind. 212, Ruger vs. Bungan 10 Ind. 451.

Applications for new trials on the ground of surprise are to the discretion of the court, Hewey vs. Nourse 54 Maine 256; the courts always inclining to the new trial whenever the mistake, surprise or accident is without blame, and the party has merits and would be otherwise without relief. Depuyster vs. Columbia Ins. Co. 2 Caines 85.

The courts have gone so far in this that, when parties demand it, new trials have been granted in some cases even when occasioned by negligence of applicant. Graham on new trials 178-9, Martyn vs. Podger 5 Bur. 2,631, DeRonbidny vs. Peak 3 Taunt. 484, 4 Monroe 5 Monroe 540. It is no reply that the party did not put attorney on the stand to repel the surprise, or that he did not ask a continuance. Alger vs. Merritt 16 Iowa 121.

As to the fraudulent conduct of the opposite party or his counsel:

Any unconscientious advantage obtained during a trial by one party through fraud or artifice, will be a good ground for new trial—Graham on new trials 1,009, 1,013-4—as when material witness was concealed in plaintiff's house to prevent service of subpœna. Montpesson vs. Randle Bullers N. P. 328, or when plaintiff had in court a note material for defense, which he would not produce. Lord Mansfield said "this was an unfair advantage," and give a new trial. The rules of practice must be general, and he who abuses them in a particular should not shelter a trick behind a regularity, and in Curry vs. King 5 Ga. 75, when defendant procured one not subpœnied, whose evidence would be material for plaintiff to absent himself from the court. In Jackson vs. Warfield 7 Wend. 62, counsel having deed, important to other party, turned it over to another so as that it could not be at court, and when notified to produce it, said nothing of this fact until after the trial.

In Dilly vs. Hickrote 8 Gill & Johnson 170, says a judgment fraudulent and malafides, arising from fraudulent and deceptive conduct by which plaintiff has been lulled into a security fatal to his rights, would be against conscience and ought to be enjoined.

In Webb vs. Parker, 41 Geo., counsel of defendaut promised (him) plaintiff to furnish a copy grant on trial, and unintentionally handed him a copy for a different lot, which was treated as the grant, and mistake was not discovered on trial. A verdict being for defendant, a new trial was ordered, which was reversed in Supreme Court, and verdict ordered to stand, solely on the ground that plaintiff had not shown title out of the State. New trial was ordered in equity, on the ground of this mistake or misplaced confidence.

So in Higgins vs. King, 2 Barb. Sup. Court, 616; Vilas vs. Jones, 1 Comstock, 281.

In Reigal vs. Wood, 1 John Ch. R. 402, an attorney revived his sciera facias on old judgment, knowing that it was paid, and the Court directed it to be set aside as unduly obtained.

See also Barnesly vs. Powel, 1 Ves., 120, 284, 289; Simpson vs. Hart 1 John's Ch. R., 97.

If the matter was known to the other party, and such as in conscience he ought to have discovered, and he obtains a decree, the decree is fraudulent, and ought to be set aside. 1 Eden Ch. R., 26; Dan'l Ch. R., 1,639.

Not to be put in possesion of all the circumstances necessary to the rendition of a proper decree, which is in the knowledge of the party, is a fraud on the Court. 1 Sch. L., 355.

All disingenuous attempts to stifle or suppress, or to obtain an unconscionable advantage, or to mislead the Court and jury, will be defeated by setting aside the verdict. Graham on new trials, 55; Buddington vs.

Harris, Bright., 187; Trubody vs. Brain, 9 Price, 76; Niles vs. Bucket 51 Mass.; Hilliard vs. Nichol, 2 Root, 176.

Complainant must be able to impeach the justice and equity of the verdict, upon grounds which either could not be made available to him or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party. Fiske vs. Hunt, 2 Story Rep., 587; Graham on new trial, 1,433 note 1,469.

When party having a good defense is prevented, by gross fraud of the plaintiff in the suit, and others, from setting up that defense, and a judgment is had against him, without any fault or negligence on his part, it is proper in equity for relief. Higgins vs. King, 2 Bark. Sup. Ct., 616 1 Story Eq., 252; Fonb. Eq., B. 1, ch. 1, sec. 3, note F. Vilas vs. Jones, 1 Comstock, 281.

In that numerous class of cases, where it is out of the common law tribunals to grant relief—where, by fraud of one party, or unavoidable accident, or unfortunate necessity of any kind, the other party has not been able to make that defense which he can make, and has himself been at no fault, and the term of the Court at which the judgment has been rendered has adjourned, upon well settled principles of equitable jurisdiction chancery will interfere and arrest the enforcement of an iniquitous judgment. Henning vs. Winans, 1 S. M. & M. Ch. Rep., 466.

The rule in [redacted] is, that equity interferes, if circumstances attending the trial require it. Russel vs. Stinson, 3 Hayward, 1, 11; or if trial is final, and injustice has been done, without any fault in him who is injured. 3 Hayward, 88, 210, 219, 305.

NEWLY DISCOVERED EVIDENCE.

New trials are granted on the ground of newly discovered evidence, on the same rule as in cases of fraud and surprise. The evidence must be material, not merely cumulative, and likely to produce a different result, and when connected with other facts proved on trial, will entitle him to a verdict; and if applicable to former points, must be of such permanent nature and unerring character, as to preponderate, or have a decided influence. Gra. on new trials, 1,542; 1 Litt., 35; 5 Litt., 10; Graham on new trials, 463, 70, 3, 488, 496.

If there is a mutual understanding as to sets off and payment, and a judgment be taken without such allowance, it is fradulent, and will be set aside. Story's Eq., 880.

Courts of Equity, in strong cases of unconscionable and inequitable verdicts, very frequently grant new trials, even when the complainants cannot come up to the stringent rules laid down in other cases.

Gainesborough vs. Grifford, 2P. Wms., 422; Marine Ins. Co. vs. Hodgson, 7 Cranch, 336; Pierce vs. Chastain, 3 Kelly Rep. 573; Tamer vs. McKing, 15 Geo. Rep. 550

What is fraud?

Poither defines it, "that act or artifice made use of by one party for

the purpose of deceiving another." Jeremy says its "its a device by which one party has taken an unconscionable advantage of the other." Bouvier speaks of actual or positive fraud as "the intentional employment of any cunning, deception or artifice, to circumvent, cheat or deceive another." 3 Graham on new trials, 1,008; Veazie vs. Williams, 3 Story Rep., 611; 1 Story Eq., 186.

A party entitled to relief will not forfeit that right by an unproductive effort at law. Coachman vs. Slaughter, 1 A. K. Marshal, 388; Henning vs. Winans, 1 S. & M. Ch., 466.

It is conceded that parties failing in their application for new trials at law, will not be relieved in equity, on same grounds considered in that motion, or that could have been. Graham on new trials, 1,461,2, 3.

The object of this bill is to add to that motion matters which were not then before the Court, and could not be, and which added to the matters of that motion, will make the right of complainants conclusive.

In this case the notes were received under the direction of a decree taken by Wooten for complainant, with positive directions that certain credits and payments were to be allowed. In that litigation he was the counsel of complainants, had received these credits, had taken the note only for collection of balance. Complainants had a right to rely on his seeing to it, that the admitted payments and credits were put on the notes. Instead of that, the whole amount was claimed as due. This was a gross fraud.

R. F. Lyon
Sol'r for Appe

In the Supreme Court, United States.

JOHN B. CRIM
vs.
J. M. HANDLEY, *et al.*

No. 197.

BRIEF OF P. PHILLIPS,
for Handley, Appellee.

Handley, on 14 April, 1873, brought suit in the Circuit Court United States, against Crim and Peeples, as surviving partners of the firm of King, Crim & Co., on four promissory notes executed by said firm on 1 February, 1866, in favor of Buffington & Co., or bearer, and payable respectively on 1 April, 1 May, 1 June, and 1 July, next thereafter.

The defence was payment, and this was set forth in general and special pleas.

When the case was called no motion was made for a continuance.

The trial proceeded and the evidence offered by defendants was admitted without objection, no charge was asked, and there is consequently no bill of exceptions.

The defendants' evidence consisted of sundry receipts showing payments.

Harper, the attorney in whose hands these notes had been placed by Buffington & Co., Crim and Peeples the defendants, were witnesses in the case, and also testified as to the alleged payments. p. 34–41.

Upon this evidence the case was argued and submitted.

At the time of the trial the notes and interest amounted to $4,588. There was a verdict and judgment for $3,154.21, against Crim, and Peeples was discharged on his plea of bankruptcy.

Crim then moved for a new trial; the grounds for this application do not appear. The motion was denied.

Thereupon Crim, by his solicitor Harper, the same attorney heretofore referred to, filed his bill on the equity side of the court for an injunction and new trial.

All the allegations of the bill in support of the relief prayed for were fully answered and denied. The bill was also demurred to for causes set forth. p. 60.

The case was heard by Judge Erskine in August, 1873, when the injunction was denied, execution ordered to be issued; no decision was made on the demurrer, and the bill retained for the purpose of being heard at the next term. p. 43.

Testimony was taken by complainant to sustain his allegation that the notes had been paid, and the principal witnesses were again Crim, Peeples and Harper.

On 15 December, 1873, the cause was heard by Judge Woods who entered a decree dismissing the bill with costs.

The chief grounds for the intervention of equity were this: First, that a certain record in a proceeding on the equity side of the State Court alleged to have an important bearing on the question of payment, could not be found by the clerk of said court up to the time of trial. Second, that Peeples, when testifying in the common

law case, was not in a condition of mind to tell all he knew and to speak truly. In support of this latter ground, Peeples swears—that "two or three days before the trial he had been much distressed and troubled with affection of his bowels; had not slept scarcely any for three nights; had taken opium freely, and at the time he testified was in such bad condition that he could not remember the facts in the case as they were. He swears that in another trial he will testify to sundry payments amounting to $3,251.

As to both these grounds it is sufficient to say that they gave the party the means of applying to the court for a postponement of the trial, or for a new trial at law.

The judge had bowels as well as the witness, and his compassion as well as his sense of justice would have relieved the witness from testifying when his condition was such as he describes it to have been; but we submit that equity has no jurisdiction to interfere with a judgment on any such grounds.

Originally there was no power in a court of law to grant a new trial, and so equity took jurisdiction to prevent the enforcement under certain circumstances of unconscionable judgments.

When courts of law first took this jurisdiction it was exercised only in a very limited and restricted manner; but now new trials are granted freely on equitable as well as legal grounds whenever it can be shown that injustice has been done and the party complaining has been guilty of no laches.

The rule for the intervention of equity is this:

First. If after judgment additional circumstances are discovered *not cognizable at law* but converting the controversy into a matter of equitable jurisdiction.

Second. Even though the circumstances so discovered would have been cognizable at law if known at the time,

yet if this new discovery has been caused by *fraudulent concealment.*

If the newly discovered facts would have been cognizable at law, and there has been no fraudulent concealment, the fact of their late discovery will not of itself create an equity; although if a bill of discovery *has been filed in due time*, the proceedings at law might have been stayed until the discovery was obtained.

Adams' Equity, 391.

Since writing the above I have read the well considered opinion of Mr. Justice BRADLEY, in Railroad Company vs. Neale, 1 Wood., 363, in which this subject is disposed of in conformity with the foregoing authority. It follows that the ~~same~~ must be affirmed.

Decree

P. PHILLIPS,
for Appellee.

W Hallett Phillips